

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EILEEN M. WITHROW and U.S. POSTAL SERVICE,  
POST OFFICE, Stow, OH

*Docket No. 99-2041; Submitted on the Record;  
Issued January 26, 2001*

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DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability on or after November 16, 1998; and (2) whether the Office of Workers' Compensation Programs has met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages.

The Board has duly reviewed the case on appeal and finds that appellant failed to meet her burden of proof in establishing that she sustained a recurrence of disability on or after November 16, 1998.

Appellant, then a 70-year-old letter carrier, filed a claim on July 7, 1997, alleging that on July 3, 1997 she injured her lower back in the performance of duty. She worked eight-hour shifts on a rotating schedule. The Office accepted her claim for lumbosacral strain. The Office accepted the additional condition of herniated disc at L4-5 on December 22, 1997.

Appellant returned to limited-duty work on March 1, 1998 working three hours a day. She increased her hours to five a day beginning April 6, 1998. Appellant filed a notice of recurrence of disability on December 9, 1998 alleging that, on November 16, 1998, she sustained a recurrence of total disability causally related to her July 3, 1997 employment injury.

By decision dated January 22, 1999, the Office denied her claim for recurrence of disability finding that appellant failed to submit sufficient factual information to establish that she was required to work outside her restrictions. Appellant requested reconsideration on February 1, 1999. By decision dated February 17, 1999, the Office declined to reopen her claim for review of the merits. Appellant requested reconsideration on February 19, 1999. By decision dated May 5, 1999, the Office denied modification of its January 22, 1999 decision.

In a decision dated March 31, 1999, the Office reduced appellant's compensation benefits finding that she had wage-earning capacity as a modified letter carrier. She requested

reconsideration on April 14, 1999. By decision dated May 3, 1999, the Office denied modification of the wage-earning capacity determination.<sup>1</sup>

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.<sup>2</sup> Furthermore, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her recurrence of disability and her employment injury.<sup>3</sup> This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.<sup>4</sup>

In this case, appellant's attending physician, Dr. James P. Klejka, a Board-certified physiatrist, indicated that appellant could work 5 hours a day with 3 hours of standing, 2 hours of sitting and no lifting more than 30 pounds. Appellant began working five hours a day with restrictions on April 6, 1998. Dr. Klejka stated that appellant's work restrictions were due to lumbosacral pain causally related to her lumbosacral strain. On October 16, 1998 he stated that appellant's restrictions were permanent and she was unlikely to return to full-time work.

The Office referred appellant for a second opinion evaluation with Dr. Charles J. Paquelet, a Board-certified orthopedic surgeon, on October 23, 1998. In a report dated November 6, 1998, Dr. Paquelet noted appellant's history of injury, her medical treatment and performed a physical examination. He diagnosed chronic lumbosacral strain with a herniated disc L4-5 and found that these conditions were causally related to her employment injury. Dr. Paquelet stated that appellant could not return to her date-of-injury position. He listed her work restrictions as standing for three hours and sitting for two hours in a five-hour day and noted that the restrictions were permanent.

In her claim for recurrence, appellant stated that she was required to stand for five hours in violation of her restrictions. The Office requested additional factual and medical evidence. In reports dated October 9 and November 17, 1998, Dr. Klejka stated that appellant complained that she was required to stand for the entire five hours.

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<sup>1</sup> Following appellant's appeal to the Board on May 14, 1999, the Office issued a decision dated May 28, 1999 finding that appellant had received an overpayment of compensation as the Office failed to deduct health insurance premiums from her compensation. As this decision does not address an issue before the Board at the time of appellant's appeal, the Office's decision will not be reviewed and is not affected by the Board's current decision. *Arlonia B. Taylor*, 44 ECAB 591, 597 (1993).

<sup>2</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>3</sup> *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

<sup>4</sup> *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

Appellant has not submitted sufficient factual evidence to establish that her work duties changed. She submitted no witness statements or any other evidence in support of her allegation that she was required to stand for five rather than three hours of her five-hour day. Therefore, appellant has not established a change in the nature and extent of her limited-duty requirements.

On February 9, 1999 Dr. Klejka stated that appellant had severely increased back pain which he attributed to a worsening of her disc herniation. A magnetic resonance imaging (MRI) scan on February 16, 1999 demonstrated degenerative changes resulting in the L3-4 disc herniation and generalized L4-5 disc herniation.

In a report dated March 8, 1999, Dr. Klejka stated that he believed that appellant's current condition was causally related to her employment injury. He stated that appellant was able to return to work on a light-duty basis with ongoing pain. Dr. Klejka stated that appellant "suffered an exacerbation of her symptoms while working." He added, "I do believe that her return to work exacerbated her initial disc herniation, which was noted and likely caused by her initial injury in July 1997."

Although Dr. Klejka opined that appellant had sustained a change in her nature and extent of her injury-related condition, he failed to provide the necessary rationalized medical opinion evidence explaining how appellant's additional disc herniation resulted from her accepted employment injury. This medical rationale is essential given that the MRI report indicates that appellant's disc herniations are due to degenerative changes in her spine rather than to some traumatic occurrence.

Due to the lack of supporting factual evidence establishing a change in the nature and extent of her light-duty requirements, and a lack of rationalized medical opinion evidence establishing a change in the nature and extent of her injury-related condition, appellant has failed to meet her burden of proof in establishing a recurrence of disability on or after November 16, 1998.

The Board further finds that the Office met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages.

Section 8115 of the Federal Employees' Compensation Act,<sup>5</sup> titled "Determination of wage-earning capacity," states in pertinent part:

"In determining compensation for partial disability, ... the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity....

Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>6</sup> Reemployment may not be considered suitable when the job is part time, (unless the claimant was a part-time worker at the time of the injury) or sporadic in nature; when the job is seasonal in an area where year-round employment is available; and when the job is temporary where the claimant's previous job was permanent.<sup>7</sup>

In the present case, the Office performed a retroactive wage-earning capacity determination after appellant stopped working. The Office's procedure manual provides that a retroactive determination may be made where the claimant has worked in the position for at least 60 days, the employment fairly and reasonably represents wage-earning capacity, and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting her ability to work.<sup>8</sup>

In the present case, appellant worked as a modified city letter carrier five hours a day from April 6 through November 17, 1998. She then filed a notice of recurrence of disability on December 9, 1998 alleging that on November 16, 1998 she was no longer able to perform her light-duty position. The Office initially denied this claim by decision dated January 22, 1999. The Office issued its retroactive wage-loss determination on March 31, 1999.

The Office noted that the medical evidence established that appellant was capable of working 5 hours a day, that her work restrictions were permanent, that appellant performed the duties of her limited-duty position for 5 hours a day from May 1 to November 16, 1998 and found that as she had been employed in this position for more than 60 days it could reasonably be concluded that this job fairly and reasonably reflected her ability to earn wages. The Board finds that the Office properly reduced appellant's compensation benefits based on her actual earnings in a part-time position.

Appellant requested reconsideration of this decision on April 14, 1999. She alleged that the wage-earning capacity determination did not consider her nonwork-related medical

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<sup>5</sup> 5 U.S.C. § 8115.

<sup>6</sup> *Elbert Hicks*, 49 ECAB 283 (1998).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (May 1997).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

problems. By decision dated May 3, 1999, the Office denied modification of its wage-earning capacity determination.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.<sup>9</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination, in this case, appellant.

Appellant, through her attorney alleged that the Office failed to consider her nonwork-related medical problems. The Board has held that in determining a loss of wage-earning capacity where the residuals of an injury prevent an employee from performing her regular duties, the impairments which preexisted the injury, in addition to the injury-related impairments must be taken into consideration in the selection of a job within her work tolerance. It is only subsequently acquired impairments unrelated to the injury which are excluded from consideration in the determination of work capabilities.<sup>10</sup>

In this case, appellant has failed to establish through her recurrence of disability claim additional work-related impairments, which currently prevent her from performing her limited-duty position. Therefore, the Office was not required to consider such conditions in determining appellant's wage-earning capacity based on her actual earnings in that position. As appellant has established neither a material change in the nature and extent of the injury-related condition, nor that the original determination was, in fact, erroneous, the Office properly refused to modify the wage-earning capacity determination.

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<sup>9</sup> *Sue Sedgwick*, 45 ECAB 211, 215-16 (1993).

<sup>10</sup> *James Henderson, Jr.*, 51 ECAB \_\_\_\_ (Docket No. 98-616, issued January 10, 2000).

The May 5, May 3, March 31 and January 22, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
January 26, 2001

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member